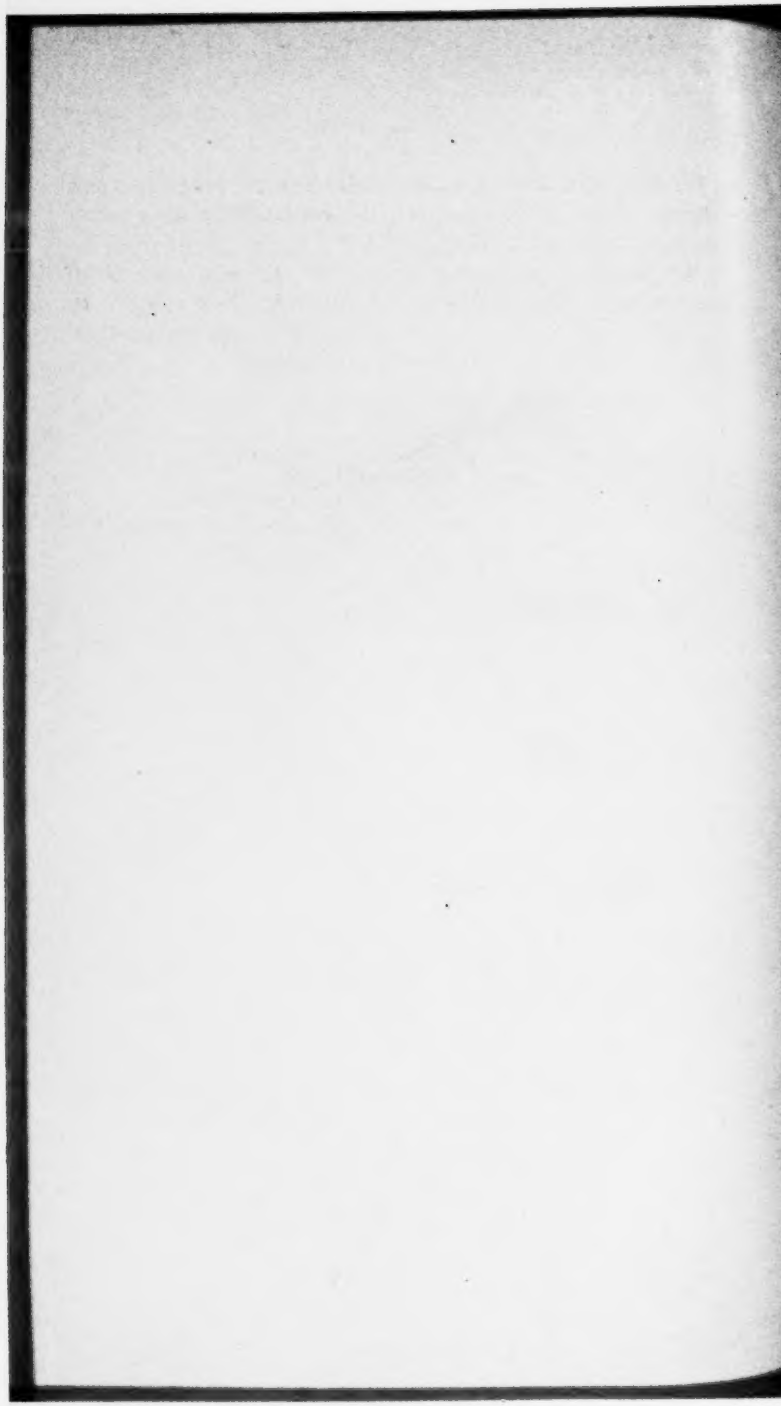

No. 290.

Brief of Plaintiff in Error.

Supreme Court of the United States.

Filed Oct. 30, 1899.

JAMES K. BROWN,
Plaintiff in Error,

vs.

THE STATE OF NEW JERSEY,
Defendant in Error.

On Writ of Error to Hudson County, N. J., Oyer and Terminer.

BRIEF FOR PLAINTIFF IN ERROR.

WM. D. DALY,
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1899.

IN THE

Supreme Court of the United States.

JAMES K. BROWN,
Plaintiff in Error,

vs.

THE STATE OF NEW JERSEY,
Defendant in Error.

Statement of the Case.

James K. Brown, the plaintiff in error, was indicted at the April Term, A. D. 1898, of the Hudson County, N. J., Court of Oyer and Terminer, for the murder of Charles Gebhardt on July twenty-sixth, 1898, and was tried by a struck jury and found guilty of murder in the first degree on October 5th, 1898, and was sentenced to be hanged.

The case was taken by writ of error to the New Jersey Court of Errors and Appeals and the judgment of the Court of Oyer and Terminer was by said Court of Errors and Appeals affirmed on March 6th, 1899, and the defendant was again

sentenced to be hanged. From the said judgment of the said Court of Errors and Appeals, affirming the said judgment of the Court of Oyer and Terminer, plaintiff in error now appeals to this Court.

It is contended by plaintiff in error that the said trial by a struck jury was in violation of Article 1, Section 7 of the Constitution of the State of New Jersey, and that by said trial he was denied the due process of law, and the equal protection of the laws guaranteed to him by the 14th amendment to the Constitution of the United States.

Brown was tried by a struck jury under the authority of Chapter 237 of the Laws of New Jersey of the year 1898. The pertinent sections of that act read as follows:

IV---Foreign and Struck Juries.

"Sec. 75. The Supreme Court, Court of Oyer and Terminer and Court of Quarter Sessions, respectively, or any judge thereof, may on motion in behalf of the State, or defendant in any indictment, order a jury to be struck for the trial thereof, and upon making said order the jury shall be struck, served and returned in the same manner as in case of struck juries ordered in the trial of civil causes, except as herein otherwise provided.

"Sec. 76. When a rule for a struck jury shall be entered in any criminal case, the Court granting such rule may, on motion of the prosecutor, or of the defendant, or on its own motion, select from the persons qualified to serve as jurors in and for

the County in which any indictment was found, whether the names of such persons appear on the sheriff's book of persons qualified to serve as jurors in and for such County or not, ninety-six names, with their places of abode, from which the prosecutor and the defendant shall each strike twenty-four names in the usual way, and the remaining forty-eight names shall be placed by the sheriff in the box in the presence of the Court, and from the names so placed in the box the jury shall be drawn in the usual way.

V---Challenges.

"Sec. 80. Every person who shall be indicted for treason, murder, misprision of treason, manslaughter, sodomy, rape, arson, burglary, robbery, forgery, perjury or subornation of perjury, and shall plead the plea of not guilty to such indictment, shall be permitted peremptorily to challenge twenty of the jury, and no more; and if any person, indicted as aforesaid, after having voluntarily and duly pleaded as aforesaid, shall peremptorily challenge a greater number of the jury than twenty, the Court shall disallow all such challenges over and above the said number of twenty; and the jury shall be charged and the trial shall proceed in like manner in all respects, and the like judgment shall be given as would or ought to be had and given if the person so indicted as aforesaid, and having pleaded as aforesaid, had not peremptorily challenged a greater number of the jury then in and by this act he or she is admitted to challenge; *provided*, this section shall not apply to struck or foreign juries.

"Sec. 81. Upon the trial of any indictment where twenty peremptory challenges are not allowed, the defendant or defendants and the Attorney-General or Prosecutor of the Pleas shall each be entitled to challenge peremptorily ten of the general panel of jurors summoned and returned by the Sheriff or other officer; and upon the trial of any indictment in cases where the defendant is entitled to twenty peremptory challenges the Attorney-General or Prosecutor of the Pleas shall be entitled to challenge peremptorily, and without assigning any cause, twelve of the jurors returned for the trial of such indictment, and upon the trial of any indictment for which a struck or foreign jury shall be summoned and returned, five peremptory challenges each shall be allowed to the defendant and to the State; challenges in all cases may be made at any time before the jury is sworn; all challenges to the array or to individual jurors, for any cause whatever, shall be triable by the Court."

I.

In England previous to the time of Henry VIII., a defendant indicted for any felony had a right to thirty-five peremptory challenges. By the Statute 22, Henry VIII. Cap. 14., the number of these peremptory challenges was reduced to twenty; and ten years later this statute was continued and made perpetual.

2 Hales Pleas 267d and 268, 1st Am. ed.

Viner, in his General Abridgment of Law and Equity (21 Vol., p. 300), says:

"The Attorney-General moved for leave to amend an information against defendant * * * and granted; and that the master might strike a jury by consent, which was also granted, being only a case of MISDEMEANOR, but NOT IN CAPITAL CASES, FOR THEN THE PRISONER WOULD LOSE HIS CHALLENGES."

Rex vs. Duncumb, 12 Mod., 224, Mich., 10 W., 3.

The same author (21 Vol. p. 301) says:

"On motion for a special jury, in the case of the King against Macartney, Trin. 2. Geo. 1, for the murder of the Duke of Hamilton, it was held by Parker, C J.: That THERE CANNOT BE A SPECIAL JURY IN CASES OF TREASON OR FELONY, for the party must have the advantage of challenging 20 in cases of felony, without cause shown. In cases of special juries, there are 48 brought before the Master, and he takes 24; so there cannot be a rule for a good jury, nor for a special jury, in this case of a trial at bar; and if there should be a special jury, it would take away the advantage the party has of challenging peremptorily. So no rule was made in this case."

In Rex vs. Edmonds, *et als* (4 Barn & Ald. and 6 Eng. Com. Law Reports, 564) the indictment was for conspiracy. The defendants were tried before a struck jury and convicted. A rule *nisi* having been obtained the conviction was affirmed. Chief Justice Abbott, in delivering the opinion of the Court, said:

"It cannot be, or at least it has not hitherto

been, ascertained, at what time the practice of apponting special (struck) juries at *nisi prius* first began. It probably arose out of the practice of appointing juries for trials at the bar of the Courts at Westminster, and was introduced for the better administration of justice and for securing the nomination of jurors duly qualified in all respects for their important office. It certainly prevailed long before the Statute 3. Geo. II., 25, and was recognized and declared by that statute WHICH REFERS TO THE FORMER PRACTICE. The whole matter is comprised in the fifteenth and two following sections of the statute."

The fifteenth section of this statute reads as follows:

"15. And, whereas, some doubt has been conceived touching the power of his Majesty's courts of law at Westminster to appoint juries to be struck before the Clerk of the Crown, Master of the Office, Prothonotaries, or other proper officers of such respective Courts, without the consent of the Prosecutor, or parties concerned in the prosecution or suit then depending, unless such issues are to be tried at the bar of the same Courts; be it declared and enacted by the authority aforesaid, That it shall and may be lawful to and for his Majesty's Courts of King's Bench, Common Pleas and Exchequer at Westminster respectively, upon motion made on behalf of his Majesty, his heirs or successors, or on the motion of any prosecutor or defendant in any indictment or information for any misdemeanor, or information in the nature of a *quo warranto*, depending,

or to be brought or prosecuted in the said Courts of King's Bench, or any information depending, or to be brought or prosecuted in the said Court of Exchequer, or on motion of any plaintiff or plaintiffs, defendant or defendants in any action, cause or suit whatsoever, depending, or to be brought and carried on in the said Courts of King's Bench, Common Pleas and Exchequer, or in any of them, and the said Courts are hereby respectively authorized and required, upon motion as aforesaid, in any of the cases before mentioned, to order and appoint a jury to be struck before the proper officer of each respective Court, for the trial of any issue joined, in any of the said cases, and triable by a jury of twelve men, in such manner as special juries have been, and are usually struck in such Courts respectively, upon trials at bar had in the said Courts, which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue."

The sixteenth section provides that the person applying for the struck jury shall pay the fees for the striking, and the seventeenth section directs the Sheriff to produce his book or lists, etc.

The case of Rex vs. Edmonds was decided in the year 1820. The Statute 3. Geo. II., was enacted in the year 1731. It refers to and declares the former practice known to the law with respect to struck juries, and conclusively shows that practice to have been that struck juries were to be resorted to in trials of misdemeanors only or in informations in the nature of *quo warranto*.

When the Constitution of New Jersey was

adopted in 1776, a defendant on trial for murder, in that State, could be tried only by an ordinary jury of the country and was entitled to twenty peremptory challenges. That Constitution contained the following clause: "XXII. That the Common Law of England as well as so much of the statute law as has been heretofore practiced in this colony shall still remain in force until they shall be altered by a future law of the Legislature, such parts only excepted as are repugnant to the rights and privileges contained in this charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony without repeal forever." This surely means that the law governing and regulating the right of trial by jury in the State of New Jersey in 1776 should remain as a part of the law of New Jersey without repeal or impairment.

The Legislature of New Jersey in 1797 passed an act in relation to juries which provided, among other things, as follows:

"XIV. And be it enacted, That it shall and may be lawful for the Supreme Court, the Court of Common Pleas, and the Court of General Quarter Sessions of the Peace, respectively, on motion, in behalf of this State, or of any prosecutor or defendant in any indictment, or information in nature of a *quo warranto*, or on motion, in behalf of this State, or of any plaintiff, demandant, avowant, tenant or defendant, in any action or suit depending or to be depending before them, and triable by a jury of twelve men, to order a jury to be struck for the trial thereof; but this clause shall not extend to any indictment for any offence

where the party is entitled to challenge peremptory, or without cause shown."

In 1844 the present Constitution of the State was adopted in which it is provided that, "The "right of a trial by jury shall remain inviolate." In 1846 the Legislature of New Jersey passed another act in relation to juries, the pertinent parts of which read as follows:

"Sec. 15. It shall and may be lawful for the Supreme Court, Circuit Courts and Courts of Common Pleas, and the Courts of General Quarter Sessions of the Peace, respectively, on motion in behalf of this State or of any prosecutor or defendant in any indictment or information in nature of a *quo warranto*, or on motion on behalf of this State or of any plaintiff, demandant, avowant, tenant or defendant in any action or suit depending or to be depending before them and triable by a jury of twelve men, to order a jury to be struck for the trial thereof, BUT THIS CLAUSE SHALL NOT EXTEND TO ANY INDICTMENT FOR ANY OFFENSE WHERE THE PARTY IS ENTITLED TO CHALLENGE PEREMPTORILY OR WITHOUT CAUSE SHOWN under the Act entitled 'An Act regulating proceedings and trials in criminal cases.'"

"Sec. 16. It shall and may be lawful for the Court of Oyer and Terminer and General Gaol Delivery, on motion in behalf of this State or of any defendant in any indictment or presentment, depending, or to be depending, before them and triable by a jury of twelve men, WHEREIN THE DEFENDANT IS NOT BY LAW ENTITLED TO

CHALLENGE PEREMPTORILY OR WITHOUT CAUSE SHOWN AS SPECIFIED IN THE PRECEDING SECTION, to order a jury to be struck for the trial thereof; which jury shall be struck before one of the Justices of the Supreme Court, in the same manner and upon the same terms as are, or may be, prescribed by law in other cases, and shall be convened by process of *venire facias* issued out of the said Court of Oyer and Terminer and General Gaol Delivery."

The Act of 1846, entitled "An Act regulating proceedings in trials in criminal cases," to which the act just quoted refers, provides with respect to peremptory challenges as follows:

"Sec. 6. Every person who shall be indicted for treason, MURDER, or other crime punishable with death, or for misprision of treason, manslaughter, sodomy, rape, arson, burglary, robbery, forgery, perjury or subornation of perjury, and shall voluntarily and duly plead the plea of not guilty to such indictment, shall be admitted peremptorily to challenge twenty of the jury, and no more; and if any person indicted as aforesaid, without having voluntarily and duly pleaded as aforesaid, shall peremptorily challenge a greater number of the jury than twenty, the Court shall disallow all such challenges over and above the said number of twenty; and the jury shall be charged and the trial shall proceed in like manner in all respects, and the like judgment shall be given, as would or ought to be given if the person so indicted as aforesaid, and having pleaded as aforesaid, had not peremptorily challenged a greater number of the

jury than in and by this act he or she is admitted to challenge."

"Sec. 7. Neither the Attorney-General nor any other person prosecuting for or in behalf of this State shall be admitted in any case to challenge any juror without assigning a cause certain to be tried and approved by the Court; and, further, the privilege of such peremptory challenges shall not be allowed to offenders in any cases but such as are specified in the section immediately preceding."

In 1874 the Legislature of New Jersey passed an act extending trial by struck juries to all criminal cases, and allowed but three peremptory challenges to the defense. In 1898 the act now in force and above quoted was passed.

Specification of Errors.

The judgment of the Court of Errors and Appeals of New Jersey, brought up for review by the writ of error in this case, is fatally erroneous:

1st. Because it affirmed the judgment of the Court of Oyer and Terminer of Hudson County, N. J., in which said last-mentioned Court the plaintiff in error was denied at his trial the due process of law guaranteed to him by the 14th Amendment to the Constitution of the United States, in this: That, at the time of his said trial, he was, by the Constitution and law of the State of New Jersey, entitled to be tried by an ordinary jury of the country, and to be admitted

to twenty peremptory challenges, whereas, contrary to the Constitution and law of New Jersey, he was denied his right to be tried by an ordinary jury of the country, and was denied his right to be admitted to 20 peremptory challenges, and was, against his objection, and contrary to the Constitution and law of New Jersey, tried by a struck jury, and restricted to five peremptory challenges.

2d. Because it affirmed the judgment of said Oyer and Terminer, in which said Court the plaintiff in error was denied at his said trial the equal protection of the laws guaranteed to him by the 14th Amendment to the Constitution of the United States, in this: That a defendant, being on trial for the offense of murder in the State of New Jersey at the time that the plaintiff in error was so tried would, under the Constitution and law of New Jersey, be entitled to be tried by an ordinary jury of the country and to be admitted to 20 peremptory challenges, whereas, contrary to the Constitution and law of New Jersey he was against his objection tried by a struck jury and restricted to five peremptory challenges; and further that there being a pretended statute of the State of New Jersey purporting to authorize trial by struck jury in a capital case and restricting a defendant so tried to five peremptory challenges, and providing that a defendant might be so tried on an order of the Court for such struck jury on the application of the public prosecutor, and there being thus recognized in New Jersey two distinct methods of trial, one much more advantageous to a defendant than the other, the plaintiff in error was against his ob-

jection and contrary to the Constitution and law of New Jersey tried by the method less advantageous to him, and was denied the equal protection of the law which, in his circumstances, should under the Constitution and law of New Jersey have been accorded to him.

3d. Because it affirmed the judgment of said Oyer and Terminer in which said Court plaintiff in error was at his said trial denied his right to be tried by an impartial jury as guaranteed to him by the Constitution of the United States and the Constitution of New Jersey, is this, that the jurors who tried said plaintiff in error were not selected, summoned, returned and impanelled in accordance with the constitution and law of New Jersey, or of any valid statute of New Jersey, but were, contrary to the constitution and law of New Jersey, nominated and selected by the Court to be returned as part of the special panel to try said case.

4th. Because it denied to the plaintiff in error the due process of law guaranteed to him by the 14th Amendment to the Constitution of the United States, inasmuch as it sustained his conviction without such due process of law.

5th. Because it denied to the plaintiff in error the equal protection of the laws guaranteed to him by said 14th amendment, inasmuch as it sustained his conviction by a struck jury.

BRIEF OF THE ARGUMENT.

As to the Right and Duty of this Court to consider this Appeal.

In Hodgson vs. Vermont, 168 U. S., 262, this Court said: "That by the 14th amendment it was "made the right and the consequent duty of this "Court when a case has been duly brought before "it to inquire whether, in the enactment and ad- "ministration of the criminal laws of the State it "is sought to arbitrarily deprive any person of his "life, liberty or property, or to refuse him equal "protection of the laws, and that such inquiry is "not precluded or ended by the mere fact that the "judgment complained of was reached by pro- "ceedings in a State Court in pursuance of a "State statute."

In Allen vs. Georgia, 166 U. S., 138, this Court said: "To justify any interference on our part it "is necessary to show that the course pursued has "deprived, or will deprive, the plaintiff in error of "his life, liberty or property without due process "of law." The course pursued in the case at bar, we expect to show, has already deprived the plaintiff in error of his liberty without due process of law, and will, unless this Court intervenes, deprive him of his life without due process of law.

In the last cited case this Court said: "With- "out attempting to define exactly in what due "process of law consists, it is sufficient to say that "if the Supreme Court of the State has acted in "consonance with the constitutional laws of the "State and its own procedure it should only be in "very exceptional circumstances that this Court

"would feel justified in saying that there had been "a failure of due legal process."

We contend that in this case the Court of Errors and Appeals of New Jersey has not acted in consonance with the constitutional laws of that State. We contend further that this case is one of very exceptional circumstances. Addressing ourselves to the action of the New Jersey Court of Errors and Appeals we ask how it is to be ascertained whether or not that court has acted in consonance with the constitutional laws of the State? Will this Court inquire? Or will this Court accept the assertion of the State court for the fact? The highest Court of a State will always act in consonance with laws which it declares or assumes to be constitutional. It would be a moral impossibility —something altogether inconceivable—for the highest Court of a State to act in consonance with laws which at the same time it should declare or concede to be unconstitutional. If this Court would feel justified in saying that there had been a failure of due legal process provided the court below had not acted in consonance with the constitutional laws of New Jersey then there would seem to be cast upon this court the duty and obligation of inquiring and ascertaining whether the State Court has or has not acted in consonance with the constitutional laws of the State. That this Court has done this in certain cases affecting property is well known. In Chicago, B. & Q. Rd. Co. vs. Chicago, 166 U. S., 226, this Court held that "A judgment of a "State Court, even if it be authorized by statute,

"whereby private property is taken for the State "or under its direction for public use, without "compensation made or secured to the owner, is, "upon principle and authority, wanting in the due "process of law required by the 14th amendment "to the Constitution of the United States, and the "affirmance of such judgment by the highest Court "of the State is a denial by that State of a right "secured to the owner by that instrument."

Unless private property is to be deemed more sacred than human life, the reasoning which would justify this Court in inquiring and determining whether a judgment of the highest Court of the State in a case concerning property is a denial of due process of law would equally justify this Court in making a similar inquiry and determination in a case involving a man's life. Hence we take it to be clearly the right and duty of this Court to consider and determine the questions brought before it on this writ of error.

What is Due Process?

We allege that the procedure provided by the statute of New Jersey for trial by a struck jury in a murder case is not due process of law. And this brings us to the question, what is due process of law as used in the 14th amendment? There have been many definitions of the term, most of which have not been conspicuously felicitous.

In *Walker vs. Sauvinet* (*92 U. S., 90*), it was said: "A State cannot deprive a person of his property without due process at law. * * * This process in the states is regulated by the law

of the state." This cannot mean that that process of law of a state which is due process of law is regulated by the law of the state; for such a statement would be a mere truism. Yet manifestly, on the other hand, due process of law cannot be taken to mean any process of law which may be prescribed or regulated by the law of the State. For if any process of law which may be prescribed or regulated by the law of a State is, *ipso facto*, due process of law, then there would be no meaning to the clause of the Federal Constitution inhibiting a state from depriving a person of life, liberty or property without due process of law. A State, *qua State*, can deprive a person of life, liberty or property without due process of law only when the State by its legislative action creates some process of law which is not due process of law and which is enforced so as to deprive or seek to deprive some person of his life, liberty or property. If the Governor of New Jersey should take a man out of jail, who was there awaiting trial, and should hang him, the man so hanged would undoubtedly be deprived of life without due process of law. But in such a case it would not be the State that deprived the man of life without due process of law. The deprivation would have been effected, not by the State nor under its authority, but by the lawless and criminal act of the Governor. And the act of the Governor, contrary to and in defiance of the law of the State, would not come within the clause of the Federal Constitution inhibiting a State from depriving any person of life, liberty or property without due process of law.

Nor can due process of law be taken to mean any process of law, which, although prescribed or regulated by the law of the State, is contrary to some provision of the Constitution of the United States other than that clause which inhibits a State from depriving any person of life, liberty or property without due process of law. For then this latter clause would be simply equivalent to a declaration that no State should deprive a person of life, liberty or property contrary to the Constitution of the United States, and would be wholly superfluous.

In *Murray vs. Land & I. Co.* (18 How., 272), Mr. Justice Curtis insisted that "due process of law must mean something more than the actual existing law of the land" (or of the State) "for otherwise the clause would be no restraint upon legislation." His view was, however, discredited in *Hutardo vs. California* (110 U. S., 516), and the doctrine of Walker vs. Sauvinet was approved. In the Hutardo case the Court said that due process of law "refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." This definition, to be of any practical value, needs at least two other definitions to explain it. What are the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? And what are "the limits of those fundamental principles"? The definition by Chancellor Kent has been extensively quoted. He

gravely declared that "the better and larger definition of due process of law is that it means law in its regular course of administration through Courts of justice." This reminds one of Polonius' definition of madness:

"For, to define true madness, what is't but to be nothing else but mad."

Indubitably!

Coke in his commentary on Magna Carta, Cap. 29, says that *lex terrae* is declared by 37 Edward III to mean due process of law; and Coke adds that due process of law means process "according to the old law of the land."

I. Chief Justice Shaw, in Jones vs. Robbins (8 Gray, 329), said: "These terms—due process of law and law of the land—cannot, we think, be used in their most bold and literal sense to mean the law of the land at the time of their (the defendants') trial, because the laws may be shaped and altered by the Legislature from time to time; and such a provision, intended to prohibit the making of any law, impairing the ancient rights and liberties of the subject, would, under such a construction, be wholly nugatory and void. The Legislature might simply change the law by statute, and thus remove the landmark and the barrier intended to be set up by this provision in the Bill of Rights. It must, therefore, have intended the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England, before the settlement of this country, and the emigrants themselves and their descendants, had found safety for their personal rights."

In Hovey vs. Elliott, 167 U. S., 409, Mr. Storey is quoted with approval where, speaking of the "due process of law" of the 5th amendment, he says. "That this clause in effect affirms the right "of trial according to the process and proceedings "of the common law." If "due process of law" means, in the 5th amendment, the right of trial according to the process and proceedings of the common law, why should not the same words in the 14th amendment mean the same thing? But, whatever may be the precise definition of "due process of law" as used in the 14th amendment a process created by a statute of a State in controvention of the constitution of that State cannot be due process of law.

The Legislation of 1898, in New Jersey, violates the Constitution of that State.

We very respectfully insist that the law of New Jersey authorizing trial by struck juries in capital cases violates Article I, Paragraph 7, of the Constitution of New Jersey. What is meant by "trial by jury?" In Thompson vs. Utah, 170 U. S., 341, this Court said: "It must consequently be "taken that the words 'jury' and the words 'trial "by jury' were placed in the Constitution of the "United States with reference to the meaning "affixed to them in the law as it was in this "country and in England at the time of the adop-"tion of that instrument."

In Callan vs. Wilson, 127 U. S., 540, this Court said that "The guarantee of a trial by jury in the "third article implied a trial in that mode and ac-

"cording to the settled rules of the common law."

In U. S. vs. Wong Kim Ark, 169 U. S. 649, this Court said: "In construing any act of legislation "whether a statute enacted by the legislature or "constitution established by the people as the "supreme law of the land, regard is to be had, not "only to all parts of the act itself, but also to the "condition and to the history of the law as "previously existing, and in the light of which the "new act must be read and interpreted."

Chief Justice Fuller in the last cited case used this language: "Obviously where the constitution "deals with common law rights and uses common "law phraseology its language should be read in "the light of the common law."

The Court of Errors and Appeals and the Supreme Court of New Jersey have repeatedly defined the meaning of trial by jury as used in the Constitution of 1776 and in the Constitution of 1844. We respectfully refer to some of these definitions.

In Johnson vs. Barclay, 1 Harr. 1, the Court said speaking of the Constitution of 1776, that by that instrument trial by jury "was adopted or rather continued as it was then used in England and in this Colony."

In Howe vs. Treasurer of Plainfield, 8th Vr. 145, the Court quoted with approval the language of Mr. Justice Strong in a Pennsylvania case where he said speaking of the right of trial by jury, "It is the old "right, whatever it was, that we previously en- "joyed, that must remain inviolate alike in its "mode of enjoyment and in its extent." * * * "It was a right—the title of which was founded

"upon usage—and its measure is, therefore, to be "sought in the usage which prevailed at the time "when it was asserted."

In Coykendall vs. Robinson, 10th Vr., 28, the Court said, speaking of the Constitution of 1844, that by that instrument "jury trial is preserved "and upheld inviolate as it existed when the Con- "stitution was adopted."

Suppose one were called upon to give an account of jury trial as it existed when the New Jersey Constitution of 1844 was adopted, what would he have to say about jury trials in murder cases? He would have to say that by the common law of England from time immemorial, and by the statute of George II, every man tried for murder was tried by an ordinary jury and that in such a case a struck jury was expressly prohibited. He would have to say that we inherited the law of England in this respect; that New Jersey solemnly adopted it in her first Constitution; that she embodied it in legislation in 1797; and in 1844 again solemnly adopted it in her second and present Constitution; that two years later she again embodied it in an act of legislation and that it continued to be the law until 1874. If, then, jury trial is preserved and upheld inviolate by the Constitution of 1844, as such trial existed when that constitution was adopted, it would seem to be quite manifest that trial by a struck jury in a murder case, which was an unlawful method of trial in such a case at the time of the adoption of the constitution, must still in such a case be an unlawful method of trial in New Jersey.

In Carter Bros. vs. Camden District Court, 20 Vroom, 600, the Court said, speaking of the Constitution of 1776, that "It does not enlarge but "merely secures the right (of trial by jury) as it "then existed." The Court added, "Neither does "the Constitution of 1844 enlarge the right. "The language of that instrument is, 'The right "of trial by jury shall remain inviolate.' The "meaning of the language is that where the right "to a jury existed before the Constitution it could "not be taken away by the Legislature." This clearly does not mean that the right could be satisfied by the awarding of any kind of a jury, but that it could only be satisfied and must be satisfied by the awarding of such a jury as would under the law at the time of the adoption of the Constitution be competent to sit in such a case.

The Court of Errors and Appeals of New Jersey in Edwards vs. Elliott, 7th Vr., 449, said: "This "right of trial by jury in civil causes"—and, *a fortiori*, in criminal cases—"as commonly under-"stood and as construed in our Courts is the right "to have all such causes heard before a jury of "twelve men according to the usual process "and practice of the Courts of common law." But now it is ruled that this right of trial by jury in capital cases is not the right to have such cases heard before a jury of twelve men according to the usual process and practice of the Courts of common law. Now, it is ruled that this right of trial by jury in capital cases is not violated by the denial of the existence of a right to have such cases heard before a jury of twelve men according to the usual process and practice of the Courts of com-

mon law. Now, it is ruled that the right of trial by jury in capital cases is preserved inviolate by a trial before a struck jury, which method of trial, according to the usual and invariable process and practice of the Courts of common law, could not be resorted to in such cases. The interdiction of trial before a struck jury in a capital case was absolute in England and in New Jersey in 1776. Trial by a struck jury in such a case was then as illegal in England and in New Jersey as trial by a jury of matrons or by a coroner's jury or by a jury of the grand assise would then have been in such a case. Now, if the Constitution of 1844, which preserved the guarantee of trial by jury in the Constitution of 1776, can be interpreted to permit trial before a struck jury in a capital case, why may it not be interpreted to permit trial before a jury of matrons or before a coroner's jury or before a jury of the grand assise in such a case? The difficulty is not met by saying that trial before a jury of matrons or before a coroner's jury or before a jury of the grand assise was unknown in 1776 and in 1844 in criminal cases. Such juries were no more unknown in 1776 and 1844 in criminal cases than struck juries were unknown in 1776 and 1844 in capital cases.

In the case of the American Saw Company vs. First National Bank, 29th Vroom, 438, the Supreme Court of New Jersey said: "A trial by "jury in this Commonwealth is such a one as in all "matters of substance accords, in this particular, "with the practice of the common law; and as- "suredly no instance can be found in which under "that system a jury ever sat to review the decision

"of a referee on the question whether a forgery or "similar tort had been committed." And equally assuredly, no instance can be found in which under that system a struck jury every sat to try a man for murder. The same Court in the same case also said: "The addition of such a factor"—meaning the submission of a referee's report to a jury as *prima facie* proof of the matters therein stated—"would materially change the nature of a "trial by jury considered as a common law institu- "tion and on that account in view of the constitu- "tion of the State its introduction would not be "within the power of legislation."

Does not trial under the New Jersey statute, by a struck jury in a capital case materially change the nature of the trial by jury in such a case at common law, and as it existed at the time of the adoption of the present Constitution of New Jersey? If so, "its introduction would not be within the "power of the legislation."

The Court of Chancery of New Jersey said in 1832, in the case of Scudder vs. Trenton Del. Falls Co., 1 Saxton, 694: "The Constitution (of 1776) "provides that the common law of England, as "well as so much of the statute law as have here- "tofore been practiced in this State shall remain "in force until altered, &c.; and that the in- "estimable right of trial by jury shall remain "confirmed as a part of the law of this State with- "out repeal forever. It is unnecessary to inquire "into the origin of the trial by jury or how far or "to what particular cases it has been extended in "England. How it was exercised in the colony at "the time of adopting the Constitution is a more

"important inquiry. It was a part of the common "law so far as that had been adopted or acted on "here at that time; so far it (the common law) was "to remain the law of the State until altered, but "that part of it (*i. e.*, that part of the common "law) relating to trial by jury was to remain with- "out repeal. It was to remain as it had thereto- "fore been in use." Can it be said that the right of trial by jury remains as it had theretofore been in use when a defendant on trial for his life can be tried by a jury of a kind which at common law was unknown in such a case?

Judge Cooley in his great work on Constitutional Limitations, page 390, says: "Accusations of "criminal conduct are tried at the common law by "jury; and wherever the right to this trial is "guaranteed by the Constitution without qualifi- "cation or restriction, it must be understood as re- "tained in all those cases which were triable by "jury at the common law, and with all the com- "mon law incidents to a jury trial so far, at least, "as they can be regarded as tending to the protec- "tion of the accused." This Court in Hayes vs. Missouri, 120 U. S., 68, declared that "the per- "emptory challenge" is "one of the most effective "means" of protecting the accused. Coke, 3 Ins., 27, calls the peremptory challenge, "a principal "matter concerning the trial."

A defendant on trial before a struck jury in a capital case is deprived of 15 of the peremptory challenges to which he would be entitled before an ordinary jury.

Judge Cooley in his above cited work, page 506, says: "The Constitutional provisions (as to the

"right of trial by jury) do not extend the right. "They only secure it in the cases in which it was "a matter of right before. But in doing this they "preserved the historical jury of twelve men with "all its incidents unless a contrary purpose clearly "appeared."

Proffat, in his work on "Trial by Jury," commenting on Cooley's text, says (Section 84): "No matter how expressed, whether 'shall be inviolate,' or 'shall remain inviolate,' there is a reference to the mode and nature of the trial as known and used at the time of the constitutional provision."

Mr. Bishop, in his work on Criminal Procedure, Sections 892, says: "Where the (Constitutional) provision is simply, as in some States, that the right of jury trial shall REMAIN INVIOLATE, the construction is the same; namely, that it secures such trial as, AND ONLY AS, it existed in the State when the Constitution was adopted."

In the case of the State vs. Fowler, 29 Vroom, 423, where the charge was conspiracy, the late Chief Justice Beasley, in delivering the opinion of the Supreme Court of New Jersey, said:

"Sundry exceptions were taken to the course of law pursued at the trial, which will be briefly noticed seriatim.

"The first of these contentions was that the jury that had been struck was unconstitutional, inasmuch as the fundamental law, which declares that 'the right of a trial by jury shall remain inviolate,' calls for an ordinary jury and not for a special one.

"The obvious answer to this objection is that the trial by a struck jury was part of the system of legal procedure derived by the people of this State from the English law, and that it was confirmed and regulated by legislation in this Commonwealth as early as the year 1797 (Pat. L.), which was forty-seven years before the Constitution of 1844 was established. The Constitutional mandate referred to, THEREFORE, did nothing more than to ratify and perpetuate the right of trial by jury as, in substance, it then existed."

It is true that "the trial by a struck jury was part of the system of legal procedure derived by the people of this State from the English law." It is true that the trial by a struck jury, "was confirmed and regulated by legislation in this Commonwealth as early as the year 1797." But it is equally true that "the trial by a struck jury was part of the system of legal procedure derived by the people of this State from the English law" for the trial, in criminal cases, of misdemeanors only. It is equally true that the trial by a struck jury "was confirmed and regulated by legislation in this Commonwealth as early as the year 1797," for the trial, in criminal cases, of misdemeanors only. While the Chief Justice was right in sustaining the conviction by a struck jury in the case before him, which was a mere misdemeanor at common law, it was most unfortunate that he should have used language so broad and so unqualified as to create the impression that he meant to affirm the constitutionality of trial by a struck jury in all criminal cases. His dictum has led to much hanging that might better have

been left undone and has now produced a judicial opinion that may be respectfully described as distinctly *sui generis*.

But, after all, the most important thing for our purpose in the Fowler case is the declaration of the Chief Justice that "the constitutional mandate referred to (the provision of the Constitution of 1844 as to the right of trial by jury) did nothing more than to ratify and perpetuate the right of trial by jury as, in substance, it then existed." To say that the mandate "did nothing more than to ratify and perpetuate," &c., does not mean that the mandate may have done something less "than to ratify and perpetuate," &c., but means that the precise and only thing which the mandate did was "to ratify and perpetuate the right of trial by jury as, in substance, it then existed." Had the Fowler case been a murder case, and had the Chief Justice investigated the history of the law relating to the trial of such a case, he certainly would not have said that "the trial by a struck jury" in such a case "was part of the system of legal procedure derived by the people of this State from the English law, and that it was confirmed and regulated" in such a case "by legislation in this Commonwealth as early as the year 1797." Is the right of a defendant, on trial for murder, to the number of peremptory challenges allowed to him by the common law of England and by the statute law of New Jersey at the time of the adoption of the Constitution a matter of "substance"? If it is, then that right, according to Beasley, is ratified and perpetuated by the Constitution. Coke says (3 Ins., 27) of the peremptory challenge that "the end of challenge

is to have an indifferent trial and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of *a principal matter* concerning his trial." Surely, "a principal matter" must be a matter of substance!

Ever since the decision in the Fowler case it has been taken for granted by the bench and the bar that the constitutionality of trial by struck juries was established in all criminal cases. Since then many defendants charged with murder have been tried and convicted by struck juries, and, on appeal to the Court of Errors and Appeals, such convictions have been sustained. In none of these cases was any question raised as to the constitutionality of such a method of trial, although in some of them the record disclosed the fact that the defendant had been tried by a struck jury. The affirmance of the judgments in those cases was therefore equivalent to the affirmance of the constitutionality of trial by a struck jury in a capital case. This was the legal situation which existed when the constitutionality of such a method of trial in such a case was for the first time distinctly raised before the Court of Errors and Appeals of New Jersey in the case at bar. The opinion of that Court delivered by Mr. Justice Depew, and now before this Court, states the grounds upon which it sustained the constitutionality of such a method of trial in such a case.

The Opinion of the Court.

The fundamental infirmity of the Court's reasoning arises from its extraordinary misconception of the historical development of English law.

The Court, in its opinion, commits itself to such astonishing and untenable propositions as these: that Magna Charta "occupies, in the Constitutional Law of England, the place of our written Constitutions, Federal and State;" that any Act of Parliament contrary to Magna Charta is as completely invalid as Acts of the Legislature are which contravene constitutional limitations; that it is competent for an English Court to express "a scruple" with respect to the validity of an Act of Parliament; that some matters appertaining to English law are beyond the control of Parliament; that Parliament is "permitted" to exercise control over certain other matters appertaining to English law; that trial by jury is of great antiquity; that King Alfred employed trial by jury; "that to King Alfred the world is indebted for the "unanimous duodecemiral judgment;" that trial by jury existed in England before the Conquest; that the possessory assizes of Henry II. were employed "sometimes" on questions of property, but "more frequently on matters of a criminal nature;" "that before Magna Charta trial by jury was a trial before a tribunal established for the determination of matters of fact, consisting of twelve men, whose decision could only be by the consent of all;" that "the words 'trial by jury' had a definite and fixed meaning at the time of Magna Charta, as well settled as any other term known to the common law;" that the *judicium parium* of Magna Charta means trial by jury; that "the qualification of jurors, and the means by which they were to be selected and empaneled, constituted no part of the essential features of trial by

jury at common law;" that Magna Charta guaranteed trial by jury; that Magna Charta is not an Act of Parliament; that certain details of trial by jury could have been "fixed in the constitution of England unalterably" if it had been desirable to do so; that England has a constitution which is susceptible of having provisions consciously inserted, incorporated or fixed in it; that by the common law from time immemorial before Magna Charta thirty-five peremptory challenges were allowed the accused in treason or felony.

These extraordinary dicta represent in part ideas in the domain of legal history that had probably never before been seriously advanced, and in part ideas that were generally entertained some years ago, but which the acumen of modern critical scholarship has long since demonstrated to be false. Judge Depue begins his historical disquisition by declaring that "trial by jury, as the means of determining questions of fact, is of great antiquity." He says: "In the Mirror of Justice satisfactory evidence is furnished that in criminal cases in the time of King Alfred trial by jury was trial by a jury of twelve men, who were sworn, and whose verdict was required to be by the concurrence of all." What Justice Depue understands the Mirror of Justice to say about trial by jury in King Alfred's time must not be taken too seriously, especially when one reflects that when the Mirror was compiled trial by jury—the thing we know as trial by jury—had no existence.

Professor E. Robertson in Article Jury in Encyclopædia Britannica says of trial by jury: "Until

quite recently this, like all other institutions, was popularly regarded as the work of a single legislator, and in England it is one of the achievements usually assigned to Alfred. It is needless to say that there is no historical foundation whatever for such a supposition."

Freeman, a scholar of æcumenical fame in the domain of English legal history, says:

"At this time of day no one need waste his time in proving that trial by jury was not invented by Alfred. * * * If by trial by jury we mean any kind of trial in which the case is decided by the oaths of men taken from among the community at large, then trial by jury is as old as any institution of the Teutonic race. If by trial by jury we mean a form of trial in which, while the royal judge lays down the law, a sworn body of men from among the community decides all questions of fact—still more, if we understand a form of trial on which the jurors cannot be called in question for any verdict which they may give—then trial by jury is a very modern thing indeed. In this form it cannot be said to be older than the time of Charles the Second."

The historical inaccuracy of the statement that trial by jury existed in the time of Alfred is unconsciously exposed by Judge Depue himself, where, in his opinion, he quotes Mr. Finalson as saying in a note to Reeve's English Law:

"It is certain that in Alfred's time there was trial by jury in criminal cases, and equally certain that jurors in those days were witnesses." One might well answer that if the jurors in those days

were witnesses then in those days there was no such thing as trial by jury. For as Freeman remarks "it is the essence" of trial by jury that the jurors "should not use their personal knowledge but should give their verdict according to the evidence laid before them by others."

Judge Depue, in support of the antiquity of a mode of trial which he erroneously conceives to have been trial by jury, quotes Coke as saying, of trial by jury: *"This trial of the fact is very ancient and was the law before the conquest. "The reference is 1 Co. Litt 155 b. On turning to Coke's text it will be found that Coke is not speaking of trial by jury at all but of trial by recognitors and that his language has been misquoted.

What Coke here says is: "This trial of the fact *per duodecem liberos et legales homines* is very ancient; for hear what the law was before the conquest: *In sengulis centuriis comitia sunto, atque liberae conditionis viri duodeni,*" &c. This is the law of Aethelred which established an accusatory body of twelve thanes of whom Freeman says: "That they certainly do not amount to jury trial as jury trial is now understood."

Turner (1 Vol., p. 535) in his history of the Anglo Saxons says with much complacency: "It is not contested that the institution of a jury existed in the time of the Conqueror. The document which remains of the dispute between Gundulf, the Bishop of Rochester, and Picot, the Sheriff, ascertains the fact." This was a dispute as to lands. It was tried before the King's brother,

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*1 Norman Conquest V. 302,

Odo, the malodorous Bishop of Bayeux, not by a jury, not by twelve recognitors but by "all the men of Kent." They decided in favor of the Sheriff, who really represented the King's interest in the case, and because Bishop Odo doubted the honesty of their decision they were compurgated by twelve of their own number. Subsequently they confessed that they had all perjured themselves.

This most assuredly is not trial by jury.

We have, however, a record of William's reign that should be able to put to rest forever all these childish notions about trial by jury at the time of the Conquest. It is the most authentic, and, for its period, the most instructive record in the whole history of English law. We refer, of course, to Domesday. In its pages may be found conclusive evidence that trial by jury was unknown in the days of the first Norman king. Domesday shows us this same Picot trying to defend his possession of lands claimed by one William de Chernet. The entry tells us that William claimed the land, alleging it to belong to the Manor of Cerdeford, a fee of Hugh de Port, his grantor. In support of his claim he produces as his witnesses before the three Commissioners who were taking the inquisition, the men of most account in the whole county and hundred. Picot on his side produces a host of villeins, common folk and reeves as his witnesses, who offered to confirm their statement by compurgation or by the ordeal or judgment of God. The witnesses for William insisted, however, upon having the dis-

puted question determined according to the law of King Edward. I.

Domesday is full of disputes about the ownership of land. These disputes were passed upon and settled judicially by the voice of the shire, the hundred, the wapenlake, the tithing; but not in a single instance is there any account of any procedure that can be distorted by the wildest imagination into trial by jury.

Reeves is cited as authority for the statement "That it was not till the reign of Henry II that the trial by jurors became general." If trial by jury existed in the days of Alfred, as the imaginative Finalson insists and Mr. Justice Depue believes, how can we account for its taking so long a time—almost three centuries—to become general? The truth is that trial by jury no more existed in the reign of Henry II than it existed in the reign of Alfred.

We are informed, in the opinion, that "the progress made in bringing this trial [by jury]

I. *Istam terram calumniatur Willelmus de Chernet decens pertinere ad manerium de Cerdeford feudum Hugonis de Port per hereditatem sui antecessoris et de hoc suum testimonium adduxit de melioribus et antiquis hominibus totius comitatus et hundredi et Picot contra duxit suum testimonium de villanis et vili plebe et de praepositis qui volunt defendere per sacramentum aut per Dei judicium quad ille qui tenuit terram liber homo fuit et potuit ire cum terra sua quo voluit. Sed testes Willelmi noluerunt accipere legen nisi regis E (44b Dom. Ex.).*

into common use was attributed to a law enacted by that King"—Henry II—"which ordained that all questions of seizin of land should be tried by a recognition of twelve good and lawful men, sworn to speak the truth. The proceeding was called '*per assisam*' and '*per recognitionem*' and the persons composing it were called 'juratores,' 'jurate' 'recognitores' 'assisa' and collectively 'assisa' and 'recognitio.' The author—Reeves—further says that the oath of twelve jurors was resorted to in other instances than those provided for by this law and then this proceeding was said to be 'per juratam patriae' or 'viceneti,' 'per inquisitionem,' 'per juramentum legalium hominum.' This proceeding * * * was sometimes used in questions of property but, it would seem, more frequently in matters of a criminal nature."

The "law" said to have been "enacted" by Henry II is none other than the assizes of Clarendon and of Northampton. The opinion confounds the grand assize and the four petty assizes of Utrum, Mort d' Ancestor, Novel Disseisin and Darrien Presentment, all of which were exclusively of a civil nature, with the separate and distinct and exclusively criminal recognitions which were provided for by the legislation of Clarendon and of Northampton.

The Grand Assize adjudicated upon disputed rights to real property. The Petty Assizes were purely possessory actions. The notion is utterly false that any of these Assizes ever tried a criminal case. The writ of assize in every instance propounded the single issue that was to be submitted to the recognitors, and that issue re-

lated either to the title to land or to the possession of it. It is, however, correct to say that a civil issue other than that stated in the writ, but collateral to it, was sometimes submitted to the recognitors who had been summoned to hold the Assize; but when such a collateral issue was submitted to them the Assize was said to fall and to be turned into a *jurata*. If for instance, in an Assize of *novel desseisin* the tenant should plead that the tenement was held by tenure in villeinage, this, if true, would defeat the claim of the demandant. It would, therefore, be important to determine the quality of the tenure. But as the quality of the tenure was not the specific question raised by the writ the Assize would be abandoned and the recognitors as *jurata patriae* would proceed to determine the quality of the tenure. This change from an assize to a jurata was expressed by the old lawyers in the formula "*Cadit assisa et vertitur incuratam.*"

The assize of Clarendon, however, and the assize of Northampton in the following year, contained articles regulating or establishing the proceeding by recognition in criminal cases wholly distinct from the civil recognitions. The first article of the former assize provided for a recognition by twelve lawful men of the Hundred and four lawful men of each Vill, who were to declare on their oaths whether there was, in the Hundred or in any Vill, any man suspected or accused of being a robber or a murderer or a thief or a harborer of robbers or of murderers or of thieves. By the latter assize it was enacted that if any one were accused before the King's justices of any of these

offenses or of forgery or of arson, by the oaths of twelve Knights of the Hundred and of four men of each Vill, he was to be sent to the ordeal of water. If he failed at the ordeal he was to suffer the loss of a foot; if he succeeded he was to be banished the realm. The method of procedure before the justices in eyre was for the twelve hundredors to present on their oath that the defendant was guilty or was suspected of being guilty of any of these crimes. Then the representatives of the wills were sworn. If they concurred with the hundredors the defendant was forced to the ordeal. Stubbs says: "By the Assize of Clarendon inquest is to be made through each county and through each hundred by twelve lawful men of the hundred and by four lawful men of each township 'by their oath that they will speak the truth.' By these all persons of evil fame are to be presented to the justices (in eyre) and then to proceed to the ordeal; if they fail in the ordeal they undergo the legal punishment (*alterum pedem amittere*); if they sustain the ordeal, yet, as the presentment against them is based on the evidence of the neighborhood *on the score of bad character*, they are to abjure the realm."

"The system thus established," says Mr. Justice Stephens, "is simple. The body of the county are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds, he is, nevertheless,

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[1]Stubb's Cons. Hist., I. 614.

to be banished. Accusation, therefore, was equivalent to banishment, at least."[2]

And this is what the Court of Errors and Appeals calls trial by jury![3]

Judge Depue says: "It is conceded by all who have written on this subject that before Magna Charta trial by jury was a trial before a tribunal established for the determination of matters of fact, consisting of twelve men, whose decision could, only be by the consent of all. The words 'trial by jury' had a definite and fixed meaning at the time of Magna Charta, as well settled as any other term known to the Common law." This is sufficiently dogmatic, but is it true?

In the suit of the Bishop of Ely vs. the Abbot of St. Edmunds, in the twelfth year of John, there was a jury of eighteen Knights, six of whom were chosen by each litigant and six by Hubert Walter and Geoffroy Fitz Peter! There are repeated

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[2]I Hist. Cr. L. of Eng., 252. The loss of a hand was added to the penalty by the Assize of Northampton.

[3]Here is an entry Anno 1201: Hundredus de Esta. Juratores dicunt quod male credunt W. F. de morte A. de C. ita quod die procedente minatus fuit ei de corpore et catallis suis. Et iiij villatae juratæ proximae malecredunt eum; inde Consideratum est quod purget se per aquam per assisam (Select Pleas of the Crown, Pl. 5). The date of this entry is perilously near the date of Magna Charta, when, we are given to understand by the Court, trial by jury was a flourishing institution.

entries, in the Year Books, of criminal trials before tribunals of forty-four men—the combined recognitors of two hundreds and four vills.

Here is a specimen of "trial by jury" as practiced in the thirty-fourth year of Henry III. In a suit about land ten recognitors and ten charter witnesses were summoned. Simon, the feoffor, was declared by the recognitors to have been *non compos* at the time of the enfeoffment. The seven charter witnesses pronounced him *compos*. Thereupon one of the parties to the litigation offered the King twenty marks for the privilege of adding to the panel eight men of Northamptonshire and eight of Huntingdon who had known Simon ("qui habuerunt notitiam de predicto Simone") and the other side offered ten marks for the privilege of adding eight men of Bedford and eight of Buckinghamshire. The King, like the frugal man he was, took the money from both sides and ordered the thirty-two recognitors to be added to the panel as requested! I.

Here then was a trial by a tribunal consisting of forty-two recognitors and seven charter witnesses who acted as recognitors. Was this trial by jury? In 1249, parts of Winchester had become infested with robbers; lawlessness was rampant, and thugs generally were in a very sad way. Then, we are told "The King came down to Winchester, assembled the freeholders of the County in the castle, raged and stormed against them; he would try the whole County for treason by all the other

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Select Civil Pleas, 183.
1 Curia Regis Roll No. 140. M. 10.

counties of England. The gates of the castle were suddenly closed. A jury of twelve was sworn in and deliberated long. The jurors made a most inadequate presentment. They were forthwith committed to prison under sentence of death as manifest perjurers. Another jury was sworn in. After a lengthy and secret confabulation the string of their tongue was loosened and, in mortal terror, they denounced many rich and theretofore respected folk and even some members of the King's household. From thirty to a hundred men (according to the different reports of the affair) were hanged." One may, if he is so minded, go so far as to call this proceeding trial by jury. But calling it trial by jury will not assuredly make it trial by jury. It was a trial by recognitors, who on their own knowledge of the facts or common fame, accused men of crime and whose accusation was equivalent to a condemnation. The fact that these recognitors were acting under royal duress does not detract from the legality of the form of trial. I.

Now as to the unanimity of the "jury." In the Petty Assizes of Henry II a verdict could be rendered by seven recognitors.1 In Britton's time, the latter part of the thirteenth century, in criminal cases, if the majority of the recognitors knew the facts and the minority knew nothing of them judgment was to be given according to the finding of the majority.2 The doctrine of unanimity was

1. 2 Pollock & Maitland, Hist. Eng. Law, 652.
1. Bracton, f. 179*b*, 255*b*.
2. Britton, 1, 31.

not established until late in the reign of Edward III.3

But when unanimity began to be regarded as important a process was resorted to for securing it which deprived it of the peculiar value which it possesses in our modern system. If it turned out that some of the recognitors were ignorant of the facts upon which they were summoned and sworn to pass they were put off the panel and other recognitors who knew, or were supposed to know, the facts were substituted for them. The same course was pursued when a recalcitrant minority of the recognitors stood out against the proposed finding of the majority. This procedure was called "afforcing the Assize." In some instances the whole panel was quashed after having been sworn because of the ignorance of its members as to the matter in dispute and a new panel would then be sworn.1

It is a remarkable fact that in New Jersey at the present day the formal record in a criminal case describes the method of trial almost precisely

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3. Y. B., 41 Ed. III, p. 31.

I. Assisa venit recognitura si Adam de Greinville et Willielmus de la Folie dessaisaverunt injuste et sine judicio Willielmum de Weston de libero tenemento suo in Suto, post primam Coronationem Dominis Regis. Juratores dicunt quod non viderunt unquam alium saisitum de tenemento illo nise W. de la Folie. Et quod nesciunt si W. de la F. dissaisisset eum inde vel non, Consideratum est quod alii juratores eligantur qui melius sciant rei veritatem. Plac. Ab. 11, Wiltesir.

as it took place by recognitors in the days of Henry II. The record on a writ of error recites, "therefore let a jury come here before the said Court at, &c., of twelve good and lawful men of this State and resident within the County aforesaid by whom *the truth of the matter may be better known* and who are not of kin to the said defendant, to *recognize* upon their oaths whether the defendant be guilty or not guilty of," &c. It will be observed that according to the record the jurors are required to have personal knowledge of the controversy; they are to be men "by whom the truth of the matter may be better known." The function that, according to the record, they are called upon to perform is precisely the function that the recognitors of Henry's day were called upon to perform. They are "to recognize upon their oaths whether the said defendant be guilty or not guilty" of the crime charged against him. There is not a word in the record to indicate that any evidence of any kind is presented to them. They say, apparently upon their own knowledge, either that the defendant is guilty or that he is not guilty. This is indeed a singular survival of the form long after the essence of the thing has vanished.

Mr. Justice Depue says that "trial by jury, as previously known to the law, was comprised in the phrase (of Magna Charta) 'legal judgment of his peers or by the law of the land.'" This is a common delusion, but was exploded and repudiated by this Court in Hurtado vs. California.

Coke says, commenting on this phrase, "*Per judicium parium suorum*, by judgment of his

peers. Only a lord of parliament of England shall be tried by by his peers, being lords of parliament; and neither noblemen of any other country, nor others that are called lords, and are no lords of parliament, are accounted pares, peers, within this statute. And it is here called *judicium parium* and not *verdictum* because the noble men returned and charged are not sworn, but give their judgment upon their honor and legiance to the King."[1] Pollock and Maitland, in their great recent work, The History of English Law, say: "The cry for a judicium parium is (to the great distortion of history) supposed to find its satisfaction in trial by jury."[2] And: "In after days it was possible for men to worship the words 'Nise per legale judicium parium suorum vel per legem terrae,' because it was possible to misunderstand them. It is now generally admitted that the phrase 'judicium parium' does not point to trial by jury.[3]

Stubbs says: "The judicium parium was indeed no novelty; it lay at the foundation of all German law, and the very formula here used [in the Magna Charta] is probably adopted from the laws of Franconian and Saxon Cæsars." In support of this statement he cites an ordinance of Conrad the Salic which provided that a knight, holding of a tenant in capite, should not be deprived of his fief save "according to the custom of our ances-

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[1] 2 Co. Ins., 48, 49, or I. 2nd Plt. Co., Ins., 48, 49.

[2] Vol. I, p. 581.

[3] Vol. I, p. 152.

ters and the judgment of his peers." It will scarcely be pretended that trial by jury was known to the subjects of Conrad.1

Forsyth, referring to the *judicum parium* of Magna Charta, says: "The pares here spoken of have no reference to a jury."

Macclachlau says it is "a popular and remarkable error that the stipulation for the *judicium parium* in Magna Charta referred to the trial by jury. It (the *jndicium parium*), was a phrase perfectly understood at the period of Magna Charta and the mode of trial had been in use long before in France and in all parts of Europe where feuds prevailed. It was essentially different from the trial by jury which could never be accurately called *judicium parium*. He adds "not a single instance can be found in any charter in which the jury are called *pares* or their verdict *judicium*." 2

Although Coke's historical notions are about as valuable as his etymological notions yet he is undoubtedly right in his explanation of the *judicium parium*. This is shown by the record, cited by him, 1 Ins., 48, from the rolls of parliament of the reversal of the attainder of Thomas of Lancaster.

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1 "Præcipimus * * * ut nullus Miles * * * tam de nostris majoribus valvassoribus quam eorum militibus, sine certa et convicta culpa, suum beneficium perdat nisi secundem consuctudinem antecessorum nosrorum et judicium parium suorum." (1 Stubbs, Cons. L., 537).

1 Tr. by Jury, 92.

2 Eng. Ency. III Art., Jury.

It alleges, "*Quod contra cartam de libertatibus, cum dictos Thomas fuit unus parium et magnatum regni, in qua continetur quod dominus rex non super eum ibit nec mittet nisi per legale judicium parium suorum, tamen per recordum praedictum tempore pacis absq. aranamento seu responsione seu legali judicio parium suorum contra legem et contra tenorem Magnae Chartae,*" &c.

It will be observed that the right of Thomas to his *judicium parium* is here put expressly on the ground that he was *unus parium et magatum regni*. This ground would have been untenable if *judicium parium* meant trial by jury; for while the meanest free man in the land would, on that hypothesis, have been entitled to trial by jury, a peer prosecuted at the suit of the Crown, as Thomas had been, would not have been entitled to trial by jury. Coke (1 Ins., 48), speaking of the *judicium parium* declares that a peer is to be tried by jury only "if an appeal be brought against him, which is the suit of the party."

If anything in Magna Chartae can be deemed to so much as squint at trial by jury it is not the *judicium parium* but the *lex terræ* of Cap. 29. The *lex terrae* is defined by 37 E. III to mean "due process of law," and Coke says that "due process of law" means that "no man be put to answer without presentment before Justices, or thing of record, or by due process, or by writ original, according to the old law of the land." The *lex terrae* was not indeed trial by jury but had in it the germs of trial by jury; the *judicium parium* developed into trial before the Lord High Stewart and the House of Lords.

Judge Depue, speaking of the peremptory challenge, says, that "the means by which they (the jurors) would be selected and impanelled constituted no part of the essential features of trial by jury at common law." He is flatly contradicted in this proposition by the Supreme Court of the United States, which said, in Strauder vs. West Virginia (100 U. S., 664): "The right to a trial by jury is guaranteed to every citizen of West Virginia by the constitution of that State; and the constitution of juries," *i. e.* the means by which they are to be selected and empaneled, "is *a very essential part* of the protection such a mode of trial is intended to secure."

The assertion of Judge Depue that the means by which jurors "were to be selected and empaneled constituted no part of the essential features of trial by jury at common law," is historically erroneous.

The law of England provided that a jury should consist of twelve men; that they should be impartial and that their verdict should be unanimous.

The law of England also prescribed the means by which the jurors were to be selected and empaneled. The law as to the number, impartiality and unanimity of the jury was of no more binding effect than the law regulating the means of selecting and empaneling them. For no part of the law of England is of greater obligation than any other part. At common law the right of a defendant on trial for murder to twenty peremptory challenges, rested on precisely the same foundation and was quite as solemnly secured to him as his right to

twelve impartial jurors. The law of England awarded to him the twelve impartial jurors; the law of England awarded to him the twenty peremptory challenges. His conviction, if he were restricted to less than twenty peremptory challenges, would have been quite as illegal as his conviction by a panel of less than twelve jurors. The Parliament might, at its pleasure, change the means of empaneling and selecting jurors; but it would have been equally competent for Parliament at any time, if so disposed, to change the numerical composition of the jury, or to do away with the requirement as to unanimity, or even to abolish trial by jury altogether. The men who drafted our Constitution of 1776 knew the law of England in relation to trial by jury. They knew that impartiality was essential to the integrity of that mode of trial. They knew the methods which were provided by the law of England to insure impartiality. They approved of those methods. They desired to retain them. No one can believe that they were not utterly opposed to any diminution of the efficiency of those methods. And when they wrote in that Constitution that "the inestimable right of trial by jury shall remain confirmed as part of the law of this State without repeal forever," they meant, in the language of the Court of Errors and Appeals of New Jersey, in Edwards vs. Elliott, to perpetuate the right of trial "before a jury of twelve men according to the usual process and practice of the Courts of common law."

The Opinion says: "Although trial by jury, as that expression was understood at the time of Magna Charta, was guaranteed by that instrument

and secured to Englishmen as an inalienable right, the mode in which jurors were selected, their qualifications and extent of the right of peremptory challenges were matters committed to the power of Parliament. It would have been an entolerable grievance to have fixed in the Constitution of England unalterably all the details connected with trial by jury which were suitable to a prior age, but unsuited to later times. * * * Magna Charter is styled the 'Charter of the Liberties of Englishmen,' and occupies in the Constitutional law of England the place of our written Constitutions, Federal and State; and any act of Parliament contrary to Magna Charta is as completely invalid as acts of the Legislature are which contravene constitutional limitations (3 Co. Ins., 111; 1 Co. Litt., 81a; 2 Ins., 108)."

It would hardly be possible to accumulate, within so small a space, a greater store of various misinformation about Magna Charta and English constitutional law than is garnered in these passages from the Opinion. Magna Charta, we are told, secures trial by jury to Englishmen as an inalienable right, but such mere details as the mode of selecting jurors, their qualification and the extent of peremptory challenges were "matters committed to Parliament." By whom are we to understand these matters to have been "committed to Parliament?" What authority conceded to Parliament the power to regulate these details? By what conceivable procedure could these details or any of them or any provision on any subject have been "fixed in the Constitution of England unalterably"? What tribunal would assume jurisdiction

to pronounce an Act of Parliament, if contrary to Magna Charta, to be "completely invalid"?

The references to Coke, instead of supporting the extraordinary doctrine now, for the first time in legal history, presented to the world in this Opinion, contradict and refute it. There is no authority, respectable or not respectable, in the whole domain of English law that ever seriously disputed the propositions that Magna Charta was nothing more than an Act of Parliament; that it derived all its vigor from the fact that it was an act of the Parliament; that it never had any greater sanction than any other act of Parliament; that it was always subject to repeal at any time by Parliament and that no act of Parliament can restrict the omnipotence of succeeding Parliaments.

Judge Dupue cites 1 Co. Litt., 81a. There Coke says: "By the Statute of 25 Ed. I, Cap. 2, judgments given against any points of the Charters of Magna Charta or Charta de Foresta are adjudged void. And by the Statute of 42 E. 3, C. 1, if any statute be made against either of these charters it shall be void." It is doubtless upon this statement of Coke's regarding the Statute of Edward III, that the judge relies to sustain his assertion that an act of Parliament in derogation of Magna Charta would be void. But if the judge had examined the statute instead of being mislead by Coke's archaic phraseology, he would not have fallen into this error. That he was misled is clear enough for the Statute simply provides that Magna Charter and the Charter of Forests "soient tenuz et gardez en touz pointz et si nul es-

tatut soit fait a contrarie soit tenuz pur nul." Unless a meaning of which they have never heretofore been suspected, is to be ascribed to these words, they manifestly were designed to repeal antecedent legislation contrary to Magna Charter and to the Charter of Forests and have no prospective force or application. Coke, in the Proeme to the second part of his Institutes, says that by these words "all *former* statutes made against either of those charters are now repealed."

In the same page of Coke on Littleton, last referred to, we find a comment on Section 108 of Littleton, where the latter speaks of Magna Charter as "the Statute of Magna Charter." And there Coke says: "Though it (Magna Charter) be in form of a Charter, yet being granted *by assent and authority of parliament*, Littleton here saith it is a Statute." If Magna Charter was granted by the assent and authority of parliament, Magna Charter was a Statute, which, like all other acts of parliament, could have been at any time repealed by parliament. It is preposterous to say that an act of parliament is void because it is in derogation of an act of a preceeding parliament.

Elsewhere Coke emphasizes the fact that *Magna Charter* is merely a statute, when he says (2 Co. Ins., 524): "Whatsoever judgment is given against *the Statute* of Magna Charteris made void by this act, and may be reversed by writ of error *because the judgment is given against the law*". Judge Depue cites 2 Co. Ins., 108, and a reference to the text shows that it relates to the Statute of Marlbridge, 52 Henry III, which confirmed *Magna Charter*. The fact that many statutes were

passed from time to time confirming the Great Charter and repealing Acts of Parliament derogatory to it, demonstrates the falsity of the notion that an Act of Parliament in derogation of Magna Charter is, *ipso facto*, "completely void."

Mr. Justice Depue, in consonance with his theory as to the position of Magna Charta in English constitutional law, goes on to say: "There is not in any decision or treatise on the law of England any scruple expressed with respect to the validity of those statutes, passed after Magna Charta, which reduced the number of peremptory challenges below those which were previously allowed at common law." This statement is literally correct, but the inference which is manifestly intended to be drawn from it is utterly false.

The Judge's argument is that as trial by jury is secured inalienably by Magn Charta; as Magna Charta is in English law what our constitutions, State and Federal are in our law; as any act of parliament contrary to Magna Charta would be completely void; and as the validity of the several acts of parliament, passed since Magna Charta, reducing the number of peremptory challenges has never been questioned or doubted, therefore the number of peremptory challenges allowed in any case may be reduced without any impairment or diminution of the right of trial by jury as secured inalienably by Magna Charta.

The opinion goes on to say: "With full knowledge of the course of legislation in England, and also of the control permitted to parliament over the subject of peremptory challenges, it was declared

in our first Constitution that the right of trial by jury should remain confirmed as part of the law of this colony, without repeal, forever; and in the Constitution of 1844, that the right of trial by jury should remain inviolate."

Here then we have the Court's reasoning: Magna Charta occupies in English Constitutional law the same position as our constitutions, State and Federal, occupy in our law; Magna Charta secured the right of trial by jury inalienably; the Constitution of New Jersey secured the right of trial by jury inalienably; an Act of Parliament contrary to Magna Charta is, *ipso facto*, void; an act of the New Jersey legislature contrary to the State Constitution, is, *ipso facto*, void; but Parliament, since Magna Charta, has reduced the number of peremptory challenges that were allowed at the time of Magna Charta. Our Legislation since the adoption of the Constitution of 1844 has reduced the number of peremptory challenges that were allowed at the time of the adoption of that Constitution. The legislation in England reducing the number of peremptory challenges allowed at the time of Magna Charta has never been deemed to be contrary to the provision of Magna Charta, which secured the right of trial by jury inalienably. Therefore, the legislation in New Jersey reducing the number of peremptory challenges allowed at the time of the adoption of the Constitution of 1844 should not be deemed to be, and is not, contrary to the provisions of that constitution, which secured the right of trial by jury inalienably.

The defect of this reasoning is in its premises.

Neither trial by jury, nor anything else is inalienably secured by Magna Charta. Magna Charta does not mention trial by jury. Magna Charta does not occupy the same position in English constitutional law as our Constitutions, Federal and State, occupy in our law. An Act of Parliament contrary to Magna Charta would not be completely void but would be completely valid. The statement that no Court or writer has ever expressed any scruple as to the validity of Acts of Parliament, passed since Magna Charta, reducing the number of peremptory challenges, is true because no English Judge or writer could conceive of such a thing as a "scruple" with respect to the validity of an Act of Parliament. Coke says (4 Ins., 36): "Of the power and jurisdiction of the Parliament for making of laws in proceedure by bill, it is so transcendant and absolute as it cannot be confined either for causes or persons, within any bounds." He says its acts, even when contrary to reason and justice, are valid. He says it can convert an infant into a person of full age; it can pass attainders and can take the property, liberty and life of the subject without trial, cause or even accusation.

Coke says elsewhere (Ins. 4 part, p. 43): "Acts against the power of the Parliament subsequent bind not" and the reason is "for the latter Parliament hath ever power to abrogate suspend, qualify, explain or make void the former in the whole or in any part thereof, notwithstanding any words of restraint, prohibition or penalty in the former, for it is a maxim in the law of the Par-

liament, *quod leges posteriores priores contrarias abrogant.*"

In that very interesting book "The Commonwealth of England and Manner of Government thereof; compiled by the honorable Sir Thomas Smith, Knight; London 1589." we read "The most high and absolute power of the realm of England consisteth in the Parliament. * * * The Parliament abrogateth old laws, maketh new, giveth order for things past and for things hereafter to to be followed, changeth rights and possessions of private men, legitimateth bastards, establisheth forms of religion, altereth weights and measures, giveth form of succession to the Crown, defineth of doubtful rights whereof is no law already made, appointeth subsidies, tailes, taxes and impositions, giveth most free pardons and absolutions, restoreth in blood and name, and, as the highest court, condemneth or absolveth them whom the prince will put to trial. And to be short, all that ever the people of Rome might do either in *centuriatis comitiis* or *tributis*, the same may be done by the Parliament of England which representeth and hath the power of the whole realm both the head and body. For every Englishman is intended to be there present, either in person or by procuration and attorney, of whatsoever pre-eminence, state, dignity or quality soever he be from the prince, whether king or queen to the lowest person of England. This is the order and form of the highest and most authentical court of England."

The strongest possible evidence that Magna Charta does not occupy the same position in English Constitutional law as our Constitutions, Fed-

eral and State, occupy in our law and that an act of Parliament contrary to Magna Charta would not be completely void is found in the fact that by far the greater part of Magna Charta has been repealed by acts of Parliament. The Statute 12 Charles II, for instance, abolished the whole system of military tenures that was recognized and regulated by Magna Charta. Reliefs, aids, escuages and the other incidents of the feudal tenure of land, recognized and regulated by Magna Charta, have been swept away. The possessary assizes, recognized and regulated by Magna Charta, are gone. And even the famous Chapter 29 by which Mr. Justice Depue says trial by jury was "secured to Englishmen as an inalienable right," has been repeatedly disregarded by acts of attainder of unquestioned validity and by the establishment of the Court of Chivalry, and is now disregarded by the Act of Parliament creating Courts martial. Indeed, it is not going too far to say that there is not a single chapter of Magna Charta which has not been either wholly repealed or largely modified.

Chapter 25 of Magna Charta provides that the width of all dyed cloth shall be three yards.

Are we to understand that the width of dyed cloth is "unalterably fixed" in the British Constitution?

Chapter 21 of Magna Charta provides that the King's Sheriff or bailiff shall be entitled to hire a two-horse carriage at the rate of ten pence a day.

If this is a part of the British Constitution, it

is safe to assert that it has not yet penetrated the minds of the London hackmen.

The Supreme Court of the United States, in *Hurtado vs. California, 110 U. S., 516*, very accurately pointed out the distinction between Magna Charta and our Constitutions, Federal and State.

"The concessions of Magna Charta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land, for notwithstanding what was atributed to Lord Coke in *Bonham's Case*, 8 Coke, 115, 118*a*, the omnipotence of Parliament over the common law was absolute, even against common right and reason.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

"It recessarily happened, therefore, that as these broad and general maxims of liberty and justice *held in our system a different place and performed a different function from their position and office in English constitutional history*

and law, they would receive and justify a corresponding and more comprehensive interpretation."

Mr. Justice Depue, says: "If 20 peremptory challenges are essential to secure an impartial jury, then there has not been in England, nor is there in this State any constitutional mode of trying criminal cases of a grade less than those enumerated in the statute of Henry VIII and in the act of 1795." There is here some confusion of ideas.

When one speaks of a constitutional mode of trying criminal cases, in New Jersey, one speaks of a mode of trial prescribed, or at least permitted, by the Constitution of New Jersey. And the Constitution of New Jersey is a written document, a palpable and tangible entity, something that one may handle and scrutinize. But when one speaks of a constitutional mode of trying criminal cases in England one speaks of something that has, in our sense of the term, no existence at all. There is not, and there never has been, in our sense of the term, any constitutional mode of trying criminal cases, or any other kind of cases in England. There the mode of trial is and always has been fixed by the statutory or by the common law and either law is and always has been subject to alteration or repeal by parliament. In any of our States a law may be unconstitutional. In England a law cannot be unconstitutional. Its mere existence connotates and establishes its plenary validity for the power that makes the law is wholly unfettered by any constitutional restrictions in the domain of legislation.

II.

The plaintiff in error by his said trial before a struck jury was denied the equal protection of the laws guaranteed by the 14th amendment of the Constitution of the United States.

Under the law of Missouri appeals from the inferior Courts in four Counties of that State and in the City of St. Louis lay to the St. Louis Court of Appeals; while appeals from such inferior Courts in all other parts of the State lay to the Supreme Court of the State. It was contended in Missouri vs. Lewis (101 U. S., 22), that the inhabitants of the four Counties and of the City for which the Special Appellate Tribunal was provided were by this arrangement deprived of the equal protection of the laws.

The Supreme Court of the United States rejected this view of the matter. It said, by way of illustrating its decision, that the Legislature of New York might, without offending against the Federal Constitution, adopt the civil law and its procedure for the City of New York, and might impose the common law and its procedure on the rest of the State. The Court then proceeded to set forth the constitutional criterion of equal protection in the following words:

"If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause re-

ferred to. It (the clause) means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. * * * The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. If diversities of law and judicial proceedings may exist in the several states withont violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities *in different parts* of the same state. * * * Diversities that are allowable in different states are allowable in different parts of the same state."

In Hayes vs. Missouri (120, U. S., 68), it was insisted by the appellant that the equal protection clause was violated by an act of the Missouri Legislature, allowing the State fifteen peremptory challenges in cities of over 100,000 inhabitants, and eight peremptory challenges in the rest of the State. The Supreme Court said: "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like cir-

cumstances and conditions, both in the privileges conferred and in the liabilities imposed."

In New Jersey a man tried by a struck jury for murder, and a man tried by an ordinary jury, for murder, are not "treated alike." The latter has twenty peremptory challenges; the former has only five.

In Duncan vs. Misssouri (152 U. S., 377), the Court said that the "equal protection of the laws" guaranteed by the Constitution exists "if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

In Tinsley vs. Anderson (171 U. S., 101) the Court said: "The right to the equal protection of the laws was certainly not denied (to Tinsley) for it is apparent that the same law or course of procedure which was applied to Tinsley would have been applied to any other person in the State of Texas under similar circumstances and conditions."

A and B are separately indicted for murdering C. The "circumstances and conditions" of A and B are not only "similar" but are as nearly identical as it is possible for the "circumstances and conditions" of two men to be.

Yet under the New Jersey criminal procedure act the public prosecutor may try A before a struck jury and restrict him to five peremptory challengers and may try B before an ordinary jury and allow him twenty peremptory challenges. Would this be applying "the same law or course of precedure" to A and to B?

It, is, therefore, for the reasons above stated, confidently and respectfully submitted that the judgment against the defendant, brought up by this writ of error should be reversed.

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